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No. 01-1331

IN THE

Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE *et al.*,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

For some four decades, this Court has mandated two constitutional screens for meritless defamation suits brought by public figures, which the West Virginia Supreme Court ignored. Those two screens are mutually reinforcing, and require (1) independent appellate review of the record, and (2) clear and convincing proof of actual malice. Petition for Certiorari ("Pet."), at 11-12. The West Virginia Supreme Court made no independent review of the record on which the trial court granted summary judgment to Petitioners. Instead, the court mandated a jury trial based on the mere fact—present in every summary judgment record—that the parties disagreed over the legal significance of undisputed facts.

Failure to correct that error at this stage will neuter the independent review requirement, reducing it to a toothless doctrine without a real world role. Moreover, if litigants' mere disagreement over the fairness of electoral advertisements is alone enough to secure a jury trial, then core political speech will be impermissibly chilled. Respondent's attempted defense of the West Virginia Supreme Court decision is insubstantial,[1] and denial of immediate review will undermine federal policy.

First, this Court has jurisdiction under 28 U.S.C. § 1257(a). Refusal to review the West Virginia Supreme Court decision before trial would "seriously erode [the] federal

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[1] Petitioners National Republican Senatorial Committee and the West Virginia State Victory Committee do not discuss Respondent's arguments directly solely to the separate petition filed by the Republican National Committee ("RNC") on March 7, 2002 (Docket No. 01-1328). Petitioners understand that the RNC intends to file its own Reply Brief to address those issues.

policy" of determining the proper scope of First Amendment protections for those engaged in core political speech.

Second, the West Virginia Supreme Court engaged in an empty exercise of articulating constitutional standards without acting upon them. The West Virginia court was required to conduct a "fresh examination of crucial facts" to determine if a jury could find clear and convincing evidence of actual malice. Pet. at 16-18. Instead, the court abdicated that responsibility, holding that the appellate role was satisfied—and that further factual review should be relinquished to the jury—so long as the parties disagreed about whether political speech was a product of actual malice. Independent review is rendered meaningless when, as here, the appellate court provides no clue about the facts considered sufficient to support a jury finding of actual malice.

Third, the West Virginia Supreme Court's failure to conduct a "fresh examination of crucial facts" simply masked Respondent's failure to proffer facts from which a jury could find clear and convincing evidence of actual malice. The record evidence on that issue is not "voluminous," Brief in Opposition ("Opp.") at i, but is vacuous, as the trial court held in granting summary judgment. Under this Court's precedents, the only evidence relevant to actual malice is the state of mind of the two individuals involved in creating and publishing the advertisements. Offering only mighty rhetoric, Respondent cannot show how a sharp debate over her legislative vote record amounts to proof from which a jury could find that Petitioners in fact knew that they had falsely described those votes.

I. THE WEST VIRGINIA SUPREME COURT'S DECISION IS "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

Under this Court's "pragmatic" approach, the state court judgment is "final" for purposes of 28 U.S.C. § 1257(a) jurisdiction. Pet. at 3-4; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). This case fits squarely within the fourth *Cox* category of judgments that are "final even though further proceedings are pending in the state courts." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-55 (1989); *Cox*, 420 U.S. at 476-87. Specifically, here:

> (1) "the party seeking review . . . might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and, (3) "refusal immediately to review the state-court decision might seriously erode federal policy . . . ."

Cox, 420 U.S. at 482-83; *accord Fort Wayne*, 489 U.S. at 55-56. Respondent's contention that the West Virginia Supreme Court's decision is not "final" merely because this case does not involve the constitutionality of a state statute or a media defendant, Opp. at 2-5, 8, thus has no basis in this Court's precedents.

First, Petitioners could prevail at trial on a non-federal ground if Respondents do not prove that the advertisements were false. Pet. App. 17a-19a; *see, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 516-17 (1991) (falsity an issue of state law). Such a finding would render unnecessary review of the federal issue of whether Respondent could establish actual malice by clear

and convincing evidence. *See Fort Wayne*, 489 U.S. at 56; *Cox*, 420 U.S. at 485.

Second, summary reversal by this Court, reinstating the trial court's summary judgment in favor of Petitioners, would terminate this litigation in its entirety. Pet. at 3-4; *see Cox*, 420 U.S. at 485-86 (review proper where reversal of state supreme court would result in "no trial at all").

Third, declining review at this stage will "seriously erode federal policy" because "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne*, 489 U.S. at 55 (and authorities cited therein). Independent review and the clear and convincing actual malice standard are rules of federal constitutional law, which ensure that the First Amendment is afforded sufficient breathing space to promote the robust and wide-open exchange of ideas that lies at the heart of our system of self-government. Pet. at 11-12, 28-29.

The West Virginia Supreme Court's published decision holding that a public-figure defamation plaintiff can survive summary judgment by merely "repeatedly and continuously" disputing the facts regarding actual malice, Pet. App. 15a, empties these constitutional requirements of all content. Pet. at 17-18. That harm is not "speculat[ive]," Opp. at 6, 29, but rather presents a real and present threat to First Amendment freedoms in political campaigns conducted in the State of West Virginia. Pet. at 4, 29-30; *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) ("[I]t would be intolerable to leave unanswered" a constitutional question that affects "upcoming ... elections"). A full-blown trial of insubstantial defamation claims can have as chilling an effect on free political debate as an adverse judgment itself. As this Court stated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964):

> "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or the fear of expense of having to do so. They [will] tend to make only statements which 'steer far wider of the unlawful zone.'"

Id. at 279; Pet. at 29.

II. THE WEST VIRGINIA SUPREME COURT FAILED TO CONDUCT THE CONSTITUTIONALLY REQUIRED "FRESH EXAMINATION OF CRUCIAL FACTS."

Respondent does not dispute that: (1) as a matter of federal constitutional law, an appellate court reviewing a grant of summary judgment must conduct a "*fresh examination of crucial facts*" for clear and convincing evidence of actual malice, Pet. at 11, 13-18 (citing, *inter alia*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (emphasis added)); and, (2) the West Virginia Supreme Court failed to mention any fact—as opposed to the parties' disagreement about the record—from which a jury could find actual malice by clear and convincing evidence. *Id.* These concessions alone warrant error correction in the form of summary reversal because the West Virginia Supreme Court's decision is a "demonstrably erroneous" application of federal law. *Id.* at 12-18; *see also, e.g.*, *United States v. Bass*, 122 S. Ct. 2389, 2389 (2002) (*per curiam*) (summary reversal warranted where lower court decision was "contrary to" this Court's precedent and "threaten[ed]" a "constitutional function" of the executive).

Independent review is more than an empty slogan, and requires actual effort by an appellate court to search the record and identify the facts that would sustain a jury finding

of actual malice. Pet. at 11, 13-18. It was therefore inadequate for the West Virginia Supreme Court merely to mouth the words "review *de novo*," "plenary review," and "upon a review of the record." Pet. App. 9a, 15a; Opp. at 19-20. Confining itself to that boilerplate litany of summary judgment standards, the West Virginia Supreme Court did not even recite the rule of independent review,[2] let alone apply it. This Court has made clear that "the state courts must do more than recite the constitutional rule. They also must apply it, faithful to its letter and cognizant of the principles underlying it." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 499 (1993) (O'Connor, J., dissenting); *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (*per curiam*) (summary reversal appropriate where lower court "recited" the relevant legal standard, but failed to apply it).

This Court—and all of the federal Circuit Courts of Appeals that have addressed the issue on appeals from a grant of summary judgment—have applied the rule of independent review by discussing whether the facts proffered by the public-figure plaintiff could meet the constitutional threshold of clear and convincing evidence of actual malice. Pet. at 16-18 & nn.10-11. The West Virginia Supreme Court stands alone in its striking departure from these clear precedents: There is *no* published decision from the federal courts in which a public-figure defamation case is remanded for trial without any discussion whatsoever of the evidence regarding actual malice.

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[2] Mimicking the West Virginia Supreme Court, Respondent also does not cite or discuss the rule of independent review set out in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984), or in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) and *New York Times Co*, 376 U.S. 254—two cases that Respondent highlights. Opp. at 14.

Respondent glosses over the West Virginia Supreme Court's extraordinary decision, casually stating that the court met its constitutional obligation of independent review because it "recite[d] certain evidence taken from the record." Opp. at 20. To the contrary, the only "evidence" cited by the West Virginia Supreme Court concerned the exclusion of unspecified "deposition testimony," Pet. App. 16a n.10; Pet. at 18 n.12, which addressed falsity, not actual malice. *Compare* Pet. App. 16a n.10 (criticizing trial court for excluding portions of Respondent's evidence) *with id.* at 27a (excluding Respondent's "only record evidence concerning *falsity* . . . ." (emphasis added)).

III. THE RECORD CONTAINS *NO* EVIDENCE OF ACTUAL MALICE.

Bravado aside, Respondent cannot seriously suggest that there is a "voluminous record" on the issue of actual malice. Opp. at i. The standard is a subjective one, focusing on the state of mind of those responsible for publishing the allegedly defamatory statements. Pet. at 18-19. The relevant question is whether Respondent proffered clear and convincing evidence that Petitioners "had a *high degree of awareness* of . . . probably falsity" or "*in fact* entertained serious doubts as to the truth of [the] publication." *Harte-Hanks*, 491 U.S. at 688 (emphasis added) (internal quotations omitted); Pet. at 19. Respondent made no such showing below, and fails again to do so here.

Only two individuals were materially involved in creating and publishing the advertisements at issue: Craig Engle (who was responsible for reviewing and approving the advertisements) and David Welch (the consultant who drafted the advertisements for Petitioners' review and approval). Pet. at 7-8, 19-29. This record contains *no evidence*—let alone the constitutionally required clear and convincing evidence—that either Mr. Engle or Mr. Welch acted with actual malice. *Id.*

Respondent did not even take Mr. Engle's deposition, let alone contradict his affidavit testimony describing the process by which he verified and approved the factual statements in the advertisements. Pet. at 27-29. As a matter of law, Respondent's defamation claim fails for this reason alone because it is axiomatic that "the state of mind required for actual malice [has] to be brought home to the persons *in the [Petitioners'] organization having responsibility for the publication of the advertisement.*" *New York Times Co.*, 376 U.S. at 287 (emphasis added); Pet. at 27-28 & n.15 (additional authorities cited therein).

Undeterred, Respondent offers three wisps of actual malice "proof" involving Mr. Welch, Opp. at 29-30, none of which can survive even a mild breeze, let alone a searching, independent review of the record. It is poignant that, in offering those three items, Respondent discusses more of the record than was ever mentioned by the West Virginia Supreme Court. All three items are legally insufficient evidence of actual malice, and one of them—the ostensible use of just "part" of Respondent's voting record—confirms that Respondent seeks at trial, not to prove actual malice, but to extend her political campaign, hoping to sway jurors by presenting to them other "parts" of her voting record.[3]

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[3] The other two are Petitioners' alleged "pattern of deception" and the refusal to terminate the advertisements at the request of Respondent's opponent. Opp. at 29. The first has nothing to do with Mr. Welch's state of mind regarding his interpretation of Respondent's voting record. By Respondent's own account, that purported "pattern" either dealt with Mr. Welch's alleged statements regarding the funding of the advertisements or the alleged falsity of the advertisements. *Id.* at 12-13. Equally, the fact that Respondent's opponent asked Petitioners to "consider" terminating the advertisements, *id.* at 29, is immaterial to actual malice because Respondent does not dispute that her opponent: (1) merely objected to the "tone" of the advertisements; (2) never informed (continued...)

Respondent apparently believes that there was more to her voting record than Petitioners chose to include in the advertisements. But Respondent cannot dispute either (1) that the advertisements truthfully discussed the votes on which they focused, or (2) that Mr. Welch in fact believed that those votes were relevant to Respondent's fitness for office. Pet. at 19-29.

It is undisputed that Mr. Welch in fact believed that "[a] voting record is a voting record is a voting record. . . . [A] legislator must be held accountable for all of [her] votes." Welch Depo., at 48, 49, 50; Pet. at 25. Respondent's exaggerated claims of "distortion," "deception," "character assassination," and "fabrication," Opp. at 12-13, 17, 24, 29, reflect nothing more than her disagreement with Mr. Welch's characterization of her "true" voting record. That disagreement is precisely what political debate is all about, and does not amount to clear and convincing evidence of actual malice. *See Harte-Hanks*, 491 U.S. at 665, 666 (motive to promote one candidate over another insufficient proof of actual malice; "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term"); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) ("[D]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.").[4]

Petitioners that the advertisements were false; (3) never asked that the advertisements be withdrawn because they were false; (4) played no role whatsoever in the preparation of the advertisements; (5) did not even know that Petitioner Victory Committee existed; and, (6) did not personally review Respondent's legislative voting record. Pet. at 19-20 n.13.

[4] Far from being "parallel" to this case, Opp. at 28, *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674 (W. Va.), *cert denied*, 423 (continued...)

CONCLUSION

For the foregoing reasons, and those stated in the Petition, a writ of certiorari should issue summarily reversing the judgment of the West Virginia Supreme Court.

Respectfully submitted,

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U.S. 882 (1975), simply confirms that the West Virginia Supreme Court did not fulfill its constitutional obligation of independent review and that Respondent flunks the actual malice test. There, after exhaustively reviewing the facts regarding actual malice, the *Sprouse* court concluded that the defendant newspaper in fact was aware that the published statements were false. *Id.* at 685 ("no evidence" that defendant "had reason to believe" that plaintiff was engaged fraud); *id.* at 686 (defendant knew "for an absolute certainty" that plaintiff's business was legitimate, rather than a "dummy firm"); *id.* at 688 (information gathered by defendant contained "no facts" or "no evidence" indicating that plaintiff had engaged in improper business transactions). *Sprouse*, in any event, is not binding on this Court.